SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM: PART: 25

----------X

PEOPLE OF THE STATE OF NEW YORK, :
Indictment
: No. 10999/12
-against-
:
WILLIAM ALEXANDER,
:
Defendant.
----------X

320 Jay Street
Brooklyn, New York
December 2, 2014

B E F O R E:

HONORABLE VINCENT DELGIUDICE,
Justice of Supreme Court

A P P E A R A N C E S:

KENNETH P. THOMPSON, ESQ.
DISTRICT ATTORNEY KINGS COUNTY
BY: STEPHANIE ROSENFELD, ESQ.
DAVID RASKIN, ESQ.
Assistant District Attorneys

LEGAL AID SOCIETY
175 Remsen Street
Brooklyn, New York 11201
BY: BHARATI NARUMACHI, ESQ.
CLINTON HUGHES, ESQ.
Attorneys for the Defendant

PHYLLIS PRICE
SCOTT ISAACS
OFFICIAL COURT REPORTERS

THE CLERK: This is Indictment 10999 of 2012, William Alexander. The defense attorneys and People are present. The jury and defendant is not present at this time.

THE COURT: Counsels, sergeant informed me that Defense requested that the defendant be given a change of clothing for the purposes of trial?

I normally -- I am not a haberdasher, and it violates security protocols. The proper procedure is to have it brought through the Department of Corrections, all right. But I will make an exception at this time.

MS. NARUMACHI: Thank you, your Honor.

MR. HUGHES: Thank you, your Honor.

THE COURT: But it is not going to happen again.

MS. NARUMACHI: It won't.

THE COURT: Are there any scheduling issues regarding Police Officer Jordan, sewn and so forth?

MS. ROSENFELD: No, your Honor. She showed up this morning and I brought her over to the Defense.

THE COURT: So Defense, did you have an opportunity to speak to Officer Jordan?

MS. NARUMACHI: Yes, Judge. And I do want to address our communication with her. I would just like -- given the seriousness of this case and --

THE COURT: I am fully aware of your client's

right to be present. I am not making any substantive argument. My simple question to you, did you have an opportunity to speak to this officer?

Do you think that is necessary for your client to be present for you to respond to that? If so, I will wait.

MS. NARUMACHI: No, Judge. We did have an opportunity to speak with her.

THE COURT: Good, that's all I ask.

THE SERGEANT: Judge, I examined the pants they are okay for him to put on.

THE COURT: Is he here?

THE SERGEANT: Yes, Judge.

THE COURT: All right, let him put the pants on.

(Pause in the proceeding.)

THE COURT: Defendant is now present in the courtroom, the jury is still absent.

Ready to proceed?

MS. ROSENFELD: Yes, your Honor.

THE COURT: Any issues we have to attend to before I bring the jury in?

MS. NARUMACHI: Yes. I want to address the issue of Police Officer Jordan. She has been made available to us by the Assistant District Attorney. I did speak with her this morning. And, I would like to have her declared as a hostile witness.

PP

THE COURT: This is all premature.

MS. NARUMACHI: I could make my argument for that at a different point.

But based on the conference that we had, I believe that she is lying. And I have a good faith basis to believe she is lying, not only about what she put in police reports, but also, she did admit she was in the precinct when that photo was taken. She wasn't present at the time, but she saw it right after it was taken. And based on that -- you know -- I believe she is lying. And I would ask her to be declared a hostile witness.

THE COURT: Well, your sponsoring a witness who you think is lying, is not a definition of hostility.

MS. NARUMACHI: She would be hostile to the Defense because, she would testify in contradiction to the police reports that she wrote.

And the conversation we have had about the photo and what she said about the photo, that's why she is a hostile witness.

THE COURT: That is not the definition of hostility.

MS. NARUMACHI: I disagree, Judge.

THE COURT: Okay. Maybe my law school taught me different, all right. Back in the day when I went to law school, it is not because the witness is adverse to the

party calling them to be hostile. It is a witness who is refusing to answer questions on direct. And that decision is made after the witness is on the stand.

But when we get to your case I will have an offer of proof, and you can explain to me why you want to call a witness who you believe is lying.

MS. NARUMACHI: Judge, we would be, then, before the People rest, we would be moving to put a missing witness charge in as well. And we need to do that --

THE COURT: You already made that notification yesterday. I still remember it clearly in my mind. And I even commented that you had followed the prescription of the Appellate Division, and you gave the People notice before you rested, and then I will make a determination. Because I remember, if you can make out the six elements under Gonzalez, and it is progeny, then I will entertain your application.

Anything else?

MS. NARUMACHI: That's all.

THE COURT: Bring in the jury.

Who is your witness?

MR. RASKIN: Detective Scaturro, Judge.

COURT OFFICER: Ready for the jury, your Honor?

THE COURT: Bring the jury in.

COURT OFFICER: Jury entering.

PP

case on the various witnesses that testified regarding the incident that occurred on December 29, 2012, including the victim who testified to being robbed.

THE COURT: You are relying on the record?

MS. ROSENFELD: I will rely on the record.

THE COURT: Motion denied.

Defense plan on putting on a case?

MS. NARUMACHI: So, your Honor, the issue that we had, sort of stated before the jury came in was that, we are going to call the OCME Criminalist Hardy. But with regard to the testimony of Officer Jordan.

THE COURT: Let's have your offer of proof as to that testimony, if you don't mind.

MS. NARUMACHI: I have questioned her regarding the mug shot photo in the precinct, which is our position, this is a material issue for the Defense, and our client's right to present a defense in this case about identification that was made by the complaining witness, and the eye witness.

THE COURT: As I pointed out, I want the record to be clear, I pointed out to you yesterday that the photograph of the defendant that was taken subsequent to his incarceration and seizure by law enforcement, is not relevant in the sense that you are asking the jury to speculate. Because, when each of the two witnesses that

you showed that photograph to specifically said that was the defendant whom they saw on the street, but those weren't the clothes that he was wearing on the street.

So for you to submit that photograph that it was taken sometime after his arrest by the police department, him having different clothes on, causes the jury to speculate.

MS. NARUMACHI: Well, Judge, if I may address the issue of the photo? There is actually a case which I will hand up to the Court, and give a courtesy copy to the People, it is People v. Sanchez 2002, 293 AD2d 499. And actually, this again goes to my client's constitutional right to present a defense.

In this case defense counsel attempted to introduce a photograph. And the Court held, the denial by the trial court was improper because it was relevant to a material issue of identification that was part of the Defense case.

So, we would actually disagree. We think the Court's ruling contradicts the holding here in Sanchez.

Additionally, I have already raised constitutional arguments on behalf of my client for his right to present a defense, which is protected under the United States Constitution, and the New York State Constitution as well.

I also brought additional case law as well to address those points including, Crime v. Kentucky, 476 US 683. I

have those cases as well.

Additionally, Chambers v. Mississippi, 410 US 284. And Washington v Texas, 388 US 14. I have those cases as well, courtesy copies for the Court and for the People which I will also hand up as well.

Again, my colleague, Mr. Hughes, raised the issue of fundamental fairness yesterday which, again, I will raise as a key issue in this case, with his right to present a defense.

Not to allow testimony on his appearance on December 29th of 2012, violates his Federal Constitutional Right to present a defense to due process, and rights under the confrontation clause.

We should have a fair opportunity to defend our client against the State's accusations. And that photo not being admitted into evidence, your Honor, we believe has significantly affected our ability of our client to present a defense in this case.

THE COURT: People?

MS. ROSENFELD: First of all, no one is telling them they can't introduce the photo if they lay a proper foundation. They just have not made a proper foundation to get the photo into evidence. In the case they provided, People v. Sanchez, this case is different. This is a case where there were codefendants, and the Defense attempted

to introduce a photo of the codefendant to say that the description more closely resembles the codefendant, as opposed to the defendant. And there the Court had stopped the Defense from even attempting to put the photograph into evidence.

Where our case, Defense has been allowed twice to try and put the photo into evidence, but unable to lay a proper foundation.

MS. NARUMACHI: Judge, if I just may address the issue. There were issues with laying the foundation through Officer Thomas.

However, I believe the Court also said they didn't think the photo was relevant, which is the point we are saying Sanchez addresses, the issue of relevancy in this case.

Now while the People are right in the fact that the facts of this case in Sanchez are not somewhat the facts in this case, the material issue which the Court is actually looking at is, whether or not the Defense had the opportunity to present their defense, and misidentification was the defense in that case.

THE COURT: I know of no supreme court, United States Supreme Court, or Court of Appeals, or Appellate Division law that says that the fundamental rulings of evidence are to be twisted into an unrecognizable shape,

to allow a defendant to present a defense. All defenses that are presented must comply with the rules of evidence.

You failed to establish a sponsoring witness to establish the introduction of the photograph. We tried it with two separate witnesses.

So that is not preventing the Defense from putting on a defense. That is the Defense being unable, through rules of evidence, to have evidence introduced.

Now, I also feel that that photograph lacks relevance, notwithstanding the learned bench that wrote the Sanchez case. Sanchez case involved multiple defendants. It was a Robbery in the Second Degree aided by a person actually present. And also indicated that the Defense, at that time, would want to establish that a juvenile non codefendant at trial was the perpetrator, and that the wrong person got identified. That's not the case here.

The case here is that the defendant was identified on the street by three people who testified at this trial; the arresting officer's partner, the eye witness, Mr. Villafane, and the complaining witness. And they all testified as to the clothing that the defendant wore at the time of the incident in the vicinity of Fulton Street and Chestnut.

The photograph that was taken after the defendant was

in custody at a police station, without knowing the time, just showing that the defendant had different clothes on, does not go to the complainant's ability to recognize the defendant's face. Nor does it go to the eye witness's ability to recognize and identify the defendant. Nor does it go to the ability of the police officer who was involved in apprehending the defendant at the scene.

So based on the rules of evidence, you failed to lay a proper foundation. And I find that the photograph isn't relevant.

You can certainly again try to find some way to put that photograph into evidence -- you know -- if you have a proper foundation. But, I am standing by my ruling.

Now, other than Miss Hardy, does the Defense plan on putting on any other evidence?

MS. NARUMACHI: Can I have just one moment to confer?

MR. HUGHES: Thanks, your Honor.

THE COURT: No problem.

(Whereupon, counsel confers with co-counsel.)

MS. NARUMACHI: Judge, no, we will not be calling Police Officer Jordan to testify in the Defense case.

Now, she is here in one of the witness rooms. I did not want to release her, obviously, until we have made the

record in front of the Court.

And then I have, when appropriate, I will make my request for a missing witness charge.

THE COURT: That comes at the charge conference.

Also, does your witness wish to testify?

(Whereupon, counsel confers with client.)

MS. NARUMACHI: No. Mr. Alexander will not be testifying in this case.

THE COURT: Mr. Alexander, you know you have an absolute right to testify in your defense; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And I want to make sure that you are deciding not to testify because it is your own free will. That no one has forced you, or coerced you not to testify. And you decided by not testifying, you have the best chance of a favorable outcome in this case.

Was I correct on that?

THE DEFENDANT: Yes.

THE COURT: Did you have an opportunity to discuss this with your attorneys?

THE DEFENDANT: Yes.

THE COURT: And you all agree, it is in your best interest not to testify?

THE DEFENDANT: Yes.

Miss Hardy, I ask you, if you still have that red pen, I ask you to approach the exhibit F.

Miss Hardy, could you explain what the qualitative scale, that's exhibit F, means for FST calculations?

A So, the number that the FST gives, and that we then use in our reports. We say that so, if it indicates it was 367 times more probable.

So when that reported value basically -- once we have that number, it then will follow to a scale here ranging from one to greater than a thousand.

And then, depending on where that number falls in this scale, we then report how much support is to which probability, I guess it is.

So when we say it is 367 times more likely that the mixture is three unknown, unrelated individuals, we need to say, well, how much support?

Q What exactly does that mean?

A So, we give a quantitative value, as well as a qualitative value in our reporting, to give you an idea of what that number means.

Q Miss Hardy, can you please circle the qualitative interpretations corresponding to the FST results of comparison between William Alexander, and the trigger/trigger guard mixture in this case?

A So, the reported value is 367, which falls between

100 and 1,000. So as the report states, it is strong support here.

Q Thank you, Miss Hardy.

MR. HUGHES: Your Honor, may I have a moment?

THE COURT: Yes.

(Whereupon, counsel confers with co-counsel.)

MR. HUGHES: Nothing further.

THE COURT: Before this witness's cross-examination, let's recharge the batteries.

Keep an open mind, folks.

Freshen up in the jury room. And then we will come back out in around five or 10 minutes.

Remember all the admonitions.

Keep an open mind.

(Whereupon, the juror exits the courtroom.)

THE COURT: Okay, Miss Hardy. You can stretch your legs. We will have you back on the stand in a few moments.

All right, Counsels, be back 20 after 12.

(Whereupon, a brief recess was taken.)

(Whereupon, Phyllis Price is relieved by Scott Isaacs as the official court reporter.)

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is applied in the same way in each case regardless of result?

A Yes.

Q Can you explain exactly what was inputted into the calculation in this case?

A In this case, the known profile of William Alexander was inputted or put into the system. The mixture profile from the swab of the trigger trigger guard was put into the system, as well as that the mixture was at least a three person mixture, that information was entered, the total amount of DNA that was copied, which is 175 picograms, as well as the fact that the mixture was non-deducible.

Q What were the results in this case?

A That the mixture is 367 times more likely to be made up of three unknown, unrelated individuals versus William Alexander and two unknown, unrelated individuals.

Q So such a result tends to favor the defendant; correct?

A This result does, yes.

Q Isn't it true that approximately one-third of the time the likelihood ratio results are actually less than one which tends to indicate that the defendant is not part of a mixture that you are analyzing?

MR. HUGHES: Objection, Your Honor. May we approach?

THE COURT: Yes. Side bar.

behavior, attorneys have a right to speak to the witnesses, credibility, weight of the evidence, identification, about the defendant not testifying, police testimony, expert testimony, what competent evidence is, and the specific charges.

Any other specific requests to charge? Here's your time. Here's your chance.

MS. NARUMANCHI: Yes, Judge. We are going to ask that the missing witness charge be given regarding Police Officer Jordan.

THE COURT: As I understand the missing witness charge, the witness, if called to testify, would have been an adverse in a particular position than the party that should have called them. What is the adversity in the People's case that this police officer --

MS. NARUMANCHI: Testimony favorable to them. I'm sorry, hold on one moment, Judge. Let me just --

THE COURT: As I understand the missing witness charge, the jury is permitted to take a presumption --

MS. NARUMANCHI: Yes, I apologize.

THE COURT: -- that the missing witness would have been unfavorable to the People's case. Just show me, tell me what position would be unfavorable.

MS. NARUMANCHI: Judge, the position that would have been unfavorable goes to several different things.

The first being the color of the clothing.

THE COURT: How is it different?

MS. NARUMANCHI: She would have testified that the clothing -- that the clothing that he was wearing at the precinct did not match the description that was given by the eyewitnesses and by the complaining witness.

THE COURT: From what? From what?

MS. NARUMANCHI: She's also testified in the grand jury. She's testified --

THE COURT: Hold it. Bring that cop in, Jordan. What's her name? Jordan. Catch that cop. I'll put her on the stand, have an evidentiary hearing, find out what her testimony would have been. And I'll determine whether or not it would be adverse to the People. Right now it's not adverse.

All right. What else? Let not waste time. Any other requests to charge?

MS. NARUMANCHI: No. Just --

THE COURT: People, do you have any that I left out?

MS. ROSENFELD: No, Your Honor.

THE COURT: I didn't think so. Okay.

COURT OFFICER: Ready for the witness?

THE COURT: Yes.

COURT OFFICER: Witness entering.

THE COURT: Thank you so much for waiting around all morning, I appreciate it, Officer. If you would be so inclined just to raise your right hand.

THE CLERK: Raise your right hand.

(The witness was sworn by the clerk of the Court.)

THE CLERK: Please state your name for the record.

THE WITNESS: Lisette Jordan.

THE CLERK: Thank you. You may be seated.

THE COURT: Good afternoon, Officer Jordan. Thanks for coming by. I have a question for you.

I'm under the understanding that there is a case pending involving you as a defendant in New York County; is that correct?

THE WITNESS: Yes.

THE COURT: If you were called to the stand on this case, would you have asserted your Fifth Amendment privileges and not testify?

THE WITNESS: Yes.

THE COURT: You would have?

THE WITNESS: Yes.

THE COURT: Any questions by any side?

MS. NARUMANCHI: Yes, I do have some questions.

THE COURT: Okay.

MS. NARUMANCHI: Now, you were the arresting officer in the case --

THE COURT: The questions go to her availability, because if the witness would claim the Fifth Amendment she would be unavailable for the prosecution to call to the stand.

MS. NARUMANCHI: To testify regarding her open case, not about the arrest of Mr. Alexander.

THE COURT: No, that's --

MS. NARUMANCHI: That would not make her --

THE COURT: All right. Officer, you can step down. Just wait right outside.

(Whereupon, the witness left the stand.)

As I understand the law, if a witness would testify and take the Fifth Amendment to answer questions, she's unavailable. The witness is unavailable.

Now, you had indicated through your attempt during your opening and the attempt to put the photograph into evidence that you were going to make allegations that this officer assaulted the defendant while in the precinct which would trigger her claiming the Fifth Amendment on cross examination. Because that's what you argued. So I don't see how this person is available.

MR. HUGHES: Judge, I didn't -- in my opening -- you got the minutes before you, Your Honor -- in my opening

APPENDIX C

State of New York
Court of Appeals

BEFORE: HONORABLE PAUL G. FEINMAN
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

WILLIAM ALEXANDER,

Appellant.

ORDER DENYING LEAVE

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: June 27, 2019

Paul G. Feinman

Associate Judge

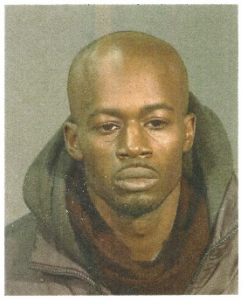
*Description of Order: Order of the Appellate Division, Second Department, dated March 6, 2019, affirming a judgment of Supreme Court, Kings County, rendered December 23, 2014.

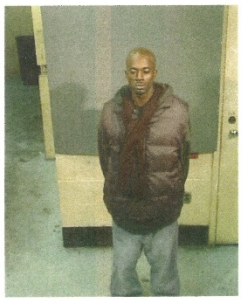
APPENDIX D

NEW YORK CITY POLICE DEPARTMENT

Mugshot Pedigree

NAME:	ALEXANDER WILLIAM
NYSID#:	06465502J
Arrest #:	K12717583
Arrest Date#:	12-29-2012
Top Charge:	PL 2650203: CRIM POSS WEAP-3RD:DEFACE WEAP
Date of Birth:	[redacted]1973
Age at Offense:	39
Social Security #:	[redacted]
PCT of Arrest:	075 PRECINCT
Source:	LIVE





PHYSICAL DESCRIPTION

Race:	BLACK
SEX:	MALE
Height:	509
Weight:	150
Hair Length:	SHORT
HAIR COLOR:	OTHER
Hair Type:	CLOSE CUT
Complexion:	CLEAR
Eye Color:	BROWN

Scars, Marks Tattoos:
Desc:
Location:
Bodyside:

Alias 1:
Alias 2:
Alias 3:
Alias 4:

ORIGINAL

APPENDIX E

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor[.]"

The Fourteenth Amendment provides, in relevant part, "nor shall any State deprive any person of . . . liberty, . . . without due process of law[.]"

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 19-6063

William Alexander (Petitioner) v. New York (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check the appropriate boxes:

☒ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

☒ I am a member of the Bar of the Supreme Court of the United States.

☐ I am not presently a member of the Bar of this Court. Should a response be requested, the response will be filed by a Bar member.

Signature _____

Date: October 15, 2019

(Type or print) Name Leonard Joblove

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Kings County District Attorney's Office

Address 350 Jay Street

City & State Brooklyn, New York Zip 11201-2908

Phone (718) 250-2511 Email jobloveL@brooklynDA.org

A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

CC: Alan S. Axelrod, Esq.

Supreme Court Docket

Search documents in this case: Search

No. 19-6063

Title:	**William Alexander, Petitioner** **v.** **New York**
Docketed:	September 25, 2019
Lower Ct:	Appellate Division, Supreme Court of New York, Second Judicial Department
Case Numbers:	(2015-00834)
Decision Date:	March 6, 2019
Discretionary Court Decision Date:	June 27, 2019

DATE	PROCEEDINGS AND ORDERS
Sep 23 2019	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 25, 2019) **Motion for Leave to Proceed in Forma Pauperis** **Petition** **Appendix** **Proof of Service**
Oct 15 2019	Waiver of right of respondent The People of the State of New York to respond filed. **Main Document**
Oct 24 2019	DISTRIBUTED for Conference of 11/8/2019.
[redacted]	[redacted] (Due December 4, 2019)
Nov 21 2019	Motion to extend the time to file a response from December 4, 2019 to January 10, 2020, submitted to The Clerk. **Main Document**
Nov 27 2019	Motion to extend the time to file a response is granted and the time is extended to and including January 10, 2020.
Jan 07 2020	Brief of respondent The People of the State of New York in opposition filed. **Main Document** **Proof of Service**
Jan 17 2020	Reply of petitioner William Alexander filed. **Main Document** **Proof of Service**
Jan 23 2020	DISTRIBUTED for Conference of 2/21/2020.

Feb 24 2020	Petition DENIED.

NAME	ADDRESS	PHONE
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Party name: William Alexander		
Attorneys for Respondent		
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Party name: The People of the State of New York		

No. 19-6063

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM ALEXANDER,

Petitioner,

v.

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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*Counsel of Record for the Respondent

January 7, 2020

QUESTION PRESENTED

Whether William Alexander's petition for certiorari should be denied because:

(1) the decision of the New York State intermediate appellate court in this case does not present an important, unsettled question of federal law, does not conflict with any decision of this Court, and is correct under well-established principles of law;

(2) even if the evidentiary ruling at issue was erroneous, the error was not of constitutional magnitude and was, in any event, harmless beyond a reasonable doubt; and

(3) under these circumstances, summary reversal, which Alexander urges, is unwarranted.

PARTIES TO THE PROCEEDING

The petitioner in this Court is William Alexander, who was convicted after trial in a New York state court of robbery and criminal possession of a weapon. The respondent is the State of New York, which is represented in this case by Eric Gonzalez, the District Attorney of Kings County, New York.

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No. 19-6063

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM ALEXANDER,

Petitioner,

v.

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

The State of New York requests that this Court deny William Alexander's petition for a writ of certiorari, in which he seeks review of an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, that affirmed Alexander's judgment of conviction for robbery and criminal possession of a weapon.

OPINION BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is reported at 170 A.D.3d 738, 93 N.Y.S.3d 608 (App. Div. 2019). That opinion is reproduced in the appendix to the petition for certiorari.

JURISDICTIONAL STATEMENT

The order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, was entered on March 6, 2019. The order of a judge of the New York Court of Appeals, denying Alexander permission to appeal to that court, was entered on June 27, 2019. The petition for certiorari was timely filed in this Court on September 23, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .

United States Constitution, Fourteenth Amendment:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The Trial

The petitioner, William Alexander ("defendant"), was tried before a jury in the New York Supreme Court, Kings County, for the gunpoint robbery, in broad daylight, of the complainant. The trial evidence included the identifications of defendant as the assailant, minutes after the crime, by the complainant and a Good-Samaritan eyewitness. The eyewitness, accompanied by the complainant, followed defendant by car as he fled the scene on a bicycle, and the eyewitness reported defendant's location to the police on a recorded 911 call.

The evidence showed that on December 29, 2012, at approximately 1:55 p.m., a black man in a bright yellow "hoodie" and a blue vest, riding a small bicycle, approached the complainant, who was walking home on Atlantic Avenue, in Brooklyn (31-33, 38-42, 50-53).[1] The man, whom the complainant identified in court as defendant, said "give me money, give me the money," pulled out a gun, and pointed it at the complainant (32-34, 36-37, 40-41). The complainant opened her purse and gave defendant

[1] Numbers in parentheses followed by the letter "a" refer to pages of the appendix filed in this Court. Unprefixed numbers in parentheses refer to pages of the trial transcript, which was part of the record on appeal.

her money -- a $20 bill and two $10 bills. Defendant grabbed at the complainant's purse, but she held onto it (34-35).

Meanwhile, the eyewitness was driving his minivan down Atlantic Avenue, when he saw a man -- defendant -- shoving something into a woman's chest; the woman looked terrified (50, 57, 60, 66-67). The eyewitness stopped his car and defendant let the complainant go, jumped on his bicycle, and pedaled away (50-52, 58-60).

The eyewitness offered to help the complainant, who got into the eyewitness's car. They circled the block and began following defendant from about a block away, and the eyewitness called 911 (35-36, 43-44, 53-55, 61; People's Exhibit 1 [recording of 911 call]). The eyewitness told the 911 operator that a black man on a bicycle wearing a yellow hoodie and a blue vest had robbed a woman at gunpoint (54, 65; People's Exhibit 1).[2] The eyewitness told the 911 operator where defendant was going, block by block (54-55, 62-63, 65; People's Exhibit 1).

At some point, defendant veered off (54, 63-64). The eyewitness spotted a police car, so he drove up and told the officers

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[2] In the petition for certiorari, counsel asserts that, at trial, both the complainant and the eyewitness described the robber as "appearing to be a teenager" (Petition at 4), but that assertion is incorrect. In fact, neither witness gave that description. The complainant estimated the age of the robber to be "[a]lmost 30, 20 something" (41); and the eyewitness answered "Yes" when asked if, in his 911 call, he described the robber as being "in his 20s" (65).

what was happening (54, 63-64). The eyewitness kept driving around and spotted defendant again, but could not follow him without going against traffic (54, 64-66).

At 2:02 p.m., Police Officer Remel Thomas received a radio call describing a gunpoint robbery by a black man, on a bicycle, wearing a yellow hoodie, a blue vest, and blue jeans (73, 103). One minute later, Officer Thomas saw a man on a bicycle, who matched that description, ride right past him (73-74, 103). The man, who made eye contact with Officer Thomas, was wearing a yellow hoodie, a blue vest, and blue jeans (73-74). Officer Thomas turned on his turret lights and pursued the man, "never los[ing] sight of him" (73-74).

The man, whom the officer identified in court as defendant, jumped off his bicycle and threw a gun to the ground (74-76, 104). Officer Thomas's partner, Police Officer Lisette Jordan, drew her weapon, and defendant put his hands up (70, 75, 78-79, 104). Officer Thomas handcuffed and searched defendant and recovered on his person one $20 bill and two $10 bills (79, 84-85 [12a-13a], 104; People's Exhibit 3 [photocopy of U.S. currency]). A loaded handgun was recovered from the sidewalk, approximately four feet away from

defendant (86, 101, 105 [17a]; People's Exhibit 4 [gun]).[3]

Meanwhile, the 911 operator called the eyewitness back and said that the police were looking for him (65-66). Officers in a patrol car directed the eyewitness to go to a specified location (54, 66). Upon arriving there, the complainant immediately identified defendant as the person who had robbed her (36-37).

Subsequently, Officers Thomas and Jordan brought defendant to the police precinct, and Officer Jordan, as the arresting officer, completed the arrest report and the complaint report (86-87, 105). An arrest photograph was taken of defendant at the precinct on the same day, but, in the photograph, defendant was wearing different clothing than he had been wearing at the time of his arrest (105-06 [17a-18a], 115 [24a]).

The People declined to call Officer Jordan to testify at trial, largely because she had an open criminal case in another county in which she was charged with misdemeanor assault (92-93, 111, 144-45 [48a-49a]). Defense counsel initially stated that the

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[3] A witness who was a DNA expert analyzed DNA that was recovered from a swab taken from the trigger or trigger guard of the gun. The witness determined that the swab presented a DNA mixture to which three or more individuals had contributed, and concluded that it was 367 times more likely that the DNA mixture obtained from that swab was from three unknown, unrelated contributors than from defendant and two unknown, unrelated contributors (190-94). The witness explained, however, that, for a number of reasons, a person could have touched the gun but not left enough DNA to be detected (223-28).

defense intended to call Officer Jordan as a witness "so that we can put the mugshot photo into evidence" (137-38 [41a-42a]), noting that Officer Jordan "was the one who had custody of the defendant" (138-39 [42a-43a]). Defense counsel subsequently interviewed Officer Jordan and declined to call her as a witness (96-97, 133 [37a], 149-52 [53a-56a], 172 [62a]). But defense counsel requested a missing witness instruction regarding the People's failure to call Officer Jordan, and the court granted that request and gave such an instruction to the jury (152 [56a], 173 [63a], 254-58, 320-21).

Defendant's Attempts to Admit the Arrest Photograph into Evidence

During cross-examination of the eyewitness, defense counsel showed him defendant's arrest photograph (which had been marked as Defendant's Exhibit A for identification) (67). The eyewitness testified that he recognized the person in the photograph as the suspect, noting: "[B]ut that is not the clothes he was wearing. Absolutely not the clothes he was wearing, unless he changed somehow. He had a yellow. It is a big difference from yellow to that color. It was yellow, and a blue vest actually" (67).

The court asked the eyewitness whether he had identified defendant based upon what the police had told him, and the eyewitness replied unequivocally that he identified defendant because the

eyewitness had recognized him (68). The eyewitness testified that defendant had been wearing a yellow hooded sweatshirt and a blue sleeveless vest, that he had been riding a small bicycle, and that, as the eyewitness was driving around, he had not seen anyone else matching defendant's description (67-69).

Defense counsel also showed Officer Thomas the arrest photograph, which, Officer Thomas testified, was taken at the precinct on the day of defendant's arrest (105-06 [17a-18a], 115 [24a]). Officer Thomas testified that he recognized the person in the photograph to be defendant, but stated that defendant was "wearing different clothes" and "was wearing multiple clothes that he could have exchanged" (105-06 [17a-18a]).

Defendant's Argument and the Court's Ruling

Defense counsel asked to move the photograph into evidence, arguing that it could establish mistaken identification, in that the clothing defendant was wearing in the photograph differed from what the actual perpetrator was wearing at the time of the robbery (108 [20a]). The trial court noted that "three separate witnesses all indicated at the scene of the arrest the clothing he [defendant] had worn, and two of them looked at this [photograph] and said that's him, but his clothing has been changed" (113 [22a]). The court stated that if defendant proffered "some kind of sponsoring testimony that this was the clothing that he was wearing and they

arrested the wrong guy," the court would admit the photograph into evidence (108-09 [20a-21a], 113 [22a]). The court later observed that admitting the photograph would allow the prosecution, on rebuttal, to elicit testimony regarding the clothing worn by "every person that was arrested in that precinct" (138 [42a]).

Before the defense case, defendant once again sought to admit the arrest photograph into evidence (168-72 [58a-62a]). The trial court stated that the defense had failed to lay a proper foundation for the photograph's admission and that the photograph was irrelevant, because, "without knowing the time" when the photograph had been taken, the defense argument regarding the clothes that defendant was wearing in the photograph would "cause[] the jury to speculate" (167-68 [57a-58a], 171-72 [61a-62a]). The court stated that the defense could still "try to find some way to put that photograph into evidence" with a proper foundation (172 [62a]).

The Defense Summation

On summation, defense counsel discussed, at length, the testimony of Officer Thomas and of the eyewitness that the clothing that defendant was wearing in his arrest photograph was significantly different from the clothing that the complainant and the eyewitness said the robber wore (264-65, 270-74). Defense counsel noted that while the clothing worn by the robber "is supposed to be a blue ski vest, a hoodie, yellow, bright yellow hoodie,"

"[w]e know that when Mr. Alexander [defendant] was photographed at the precinct shortly after his arrest, that was not the color of the clothing that he was wearing" (265); and counsel further noted that the eyewitness stated in his 911 call that the man whom he was chasing wore a yellow hoodie, but "that testimony does not match up with what we know about how Mr. Alexander appeared in his arrest photo at the precinct" (269-71).

Relying in large part on that disparity between the description of the robber's clothing given by the witnesses and the clothing that defendant was wearing in his arrest photograph, counsel argued to the jury that defendant had been misidentified as the robber.

The Verdict and the Sentence

On December 3, 2014, defendant was convicted of Robbery in the First Degree (N.Y. Penal Law § 160.15[4]) and Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03[3]). On December 23, 2014, defendant was sentenced, as a second violent felony offender, to concurrent prison terms of twenty-five years on the robbery count and fifteen years on the weapon possession count, plus five years of post-release supervision on each count.

The Appeal

Defendant appealed from his judgment of conviction to an intermediate appellate court, the Supreme Court of the State of New

York, Appellate Division, Second Judicial Department. On that appeal, defendant claimed, in relevant part, that the trial court's decision not to admit the arrest photograph into evidence deprived him of his right to present a defense under the Sixth and Fourteenth Amendments of the United States Constitution, and that the alleged error was not harmless beyond a reasonable doubt.

On March 6, 2019, the Appellate Division affirmed defendant's judgment of conviction (1a-2a). People v. Alexander, 170 A.D.3d 738, 93 N.Y.S.3d 608 (App. Div. 2019). The Appellate Division concluded that the trial court providently exercised its discretion in excluding the photograph from evidence, because defendant failed to lay a sufficient foundation for its admission. The Appellate Division further held that, in any event, even if erroneous, the failure to admit the photograph was harmless, because the proof of defendant's guilt was overwhelming and there was no significant probability that, had the photograph been admitted, the jury would have acquitted defendant (1a). 170 A.D.3d at 739, 93 N.Y.S.3d at 609.

In an order dated June 27, 2019, a judge of the New York Court of Appeals denied defendant's application for permission to appeal to that court from the order affirming the judgment of conviction (71a). People v. Alexander, 33 N.Y.3d 1066, 105 N.Y.S.3d 1 (2019).

REASONS WHY THE PETITION SHOULD BE DENIED

In his petition for certiorari, defendant challenges the trial court's evidentiary ruling that he failed to lay a proper foundation to admit his arrest photograph into evidence, and claims that this ruling deprived him of his constitutional right to present a defense. Defendant contends that his case is "ideal for summary treatment" (Petition at 2). But summary reversal is unwarranted, because defendant's claim of a constitutional violation is meritless.

Defendant's petition for certiorari should be denied for three reasons. First, defendant has not identified any issue of national importance presented by the holding of the Appellate Division in this case, and instead he apparently seeks only summary review. Second, the evidentiary ruling at issue complied with the requirements of the Constitution. Third, in any event, any error was harmless beyond a reasonable doubt.

I. This Case Presents No Issue of National Importance and No Other Compelling Reason that Would Warrant Granting the Petition for Certiorari.

Defendant's petition for certiorari should be denied. His petition does not present an "important" federal question decided by the Appellate Division in a way that conflicts with a decision of this Court, of any federal court of appeals, or of any state court of last resort. See Sup. Ct. R. 10(b), (c).

Defendant seeks summary reversal (see Petition at 2, 9, 12), but summary reversal is not warranted here. The Appellate Division's decision in this case was correct, and thus it does not present a clear constitutional error that could justify summary reversal. Cf. Sexton v. Beaudreaux, 138 S. Ct. 2555, 2560 (2018) (per curiam) (granting summary reversal where lower court's opinion "was not just wrong," but also "committed fundamental errors that this Court has repeatedly admonished courts to avoid"); Sears v. Upton, 561 U.S. 945, 946 (2010) (per curiam) (granting summary reversal where "it is plain from the face of the state court's opinion" that state court failed to apply correct constitutional standard established by this Court); Michigan v. Fisher, 558 U.S. 45, 51-52 (2009) (Stevens, J., dissenting) ("it is hard to see how this Court is justified in micromanaging the day-to-day business of state tribunals making fact-intensive decisions").

II. The Exclusion of Defendant's Arrest Photograph Pursuant to State Evidentiary Principles Was Constitutional.

Defendant's petition for certiorari should be denied because New York's rule authorizing a court to exclude relevant evidence at trial if its probative value is outweighed by certain other considerations -- as that rule was applied in this case -- is a reasonable restriction on the right to present relevant evidence. The trial court properly applied that evidentiary rule in declining to admit defendant's arrest photograph into evidence. Moreover, even if the evidentiary ruling was erroneous, that ruling did not violate defendant's constitutional right to present a defense.

A criminal defendant's right to present a complete defense at trial is a fundamental element of due process arising from both the Sixth and Fourteenth Amendments of the United States Constitution. See U.S. Const. amends. VI, XIV; Chambers v. Mississippi, 410 U.S. 284, 294-95, 302 (1973). The right to present evidence, however, is subject to reasonable restrictions, which may constitutionally authorize the exclusion of evidence "under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). States have considerable latitude under the Constitution to establish rules that exclude evidence from criminal trials. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006). Those rules do not curtail an accused's right to present

a defense, as long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." Rock v. Arkansas, 483 U.S. 44, 56 (1987); see also Michigan v. Lucas, 500 U.S. 145, 149 (1991); Chambers, 410 U.S. at 295. This Court has been "traditional[ly] reluctan[t] to impose constitutional restraints on ordinary evidentiary rulings by state trial courts." Crane v. Kentucky, 476 U.S. 683, 689 (1986).

In New York, a trial court has the discretion to exclude evidence, even if that evidence may be minimally relevant, "if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties." People v. Davis, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 740 (1977) (quotation marks and citations omitted). That evidentiary rule is neither arbitrary nor disproportionate to the purpose it is designed to serve. Indeed, that rule is substantially similar to Rule 403 of the Federal Rules of Evidence, which is entitled, "Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons," and which states:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the

> issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403.

The evidentiary ruling at issue in this case did not violate any constitutional principle and does not requires this Court's attention. The trial court applied "standard rules of evidence" concerning admissibility (see Taylor, 484 U.S. at 410) when it weighed the limited probative value of the arrest photograph against the adverse risks that would arise from its presentation to the jury. See Holmes, 547 U.S. at 326 ("well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury" [citing, inter alia, Fed. R. Evid. 403]).

Three factors support the propriety of the trial court's ruling to exclude the arrest photograph. First, the trial court apparently, and reasonably, concluded that, in the absence of a proper foundation regarding the time of the taking of the arrest photograph and the circumstances of defendant's custody until that time, admitting the photograph would have left the jury to speculate as to how much time passed from when defendant was arrested until the photograph was taken and what opportunities defendant might have had during that time to exchange his clothes

with another person who was in custody at the precinct (167-68 [57a-58a], 171-72 [61a-62a]). Officer Thomas testified that the arrest photograph of defendant was taken at the precinct on the day of his arrest (105-06 [17a-18a], 115 [24a]) -- and that the arrest occurred shortly after 2:00 p.m. (72, 103) -- but he did not testify that he was present when the photograph was taken, or that he knew at what time it was taken, or that he knew what opportunities defendant might have had to exchange his clothes with someone else before the photograph was taken.

Second, the trial court noted that admitting the arrest photograph would have risked unnecessarily prolonging the trial, by opening the door for the prosecution, on rebuttal, "to bring in testimony as to every person that was arrested in that precinct" and "the clothing that that person had," thus potentially creating "a trial within a trial" (138 [42a]).

Third, the testimony of Officer Thomas showed that the arresting officer -- Officer Jordan -- had taken the photographs of the bicycle and the gun that were recovered, and had made the photocopy of the currency that was recovered (77 [9a], 79-83, 87 [15a]), and that she had completed the police reports (105 [17a]). Thus, there was reason to believe that Officer Jordan could provide additional information regarding the circumstances surrounding the taking of the arrest photograph. Defense counsel initially stated

that the defense intended to call Officer Jordan as a witness, in order to seek to put the arrest photograph into evidence (133-39 [37a-43a]), and defense counsel subsequently interviewed Officer Jordan. But, despite the court's invitation to defense counsel that "[y]ou can certainly again try to find some way to put that photograph into evidence . . . if you have a proper foundation" (172 [62a]), counsel ultimately decided not to call Officer Jordan to testify. Instead, defense counsel requested (and the court gave the jury) a missing witness instruction regarding the prosecution's failure to call that officer (172-73 [62a-63a]); and, in summation, counsel took the prosecution to task for not calling Officer Jordan as a witness, arguing that Officer Jordan "had eyes on him [defendant] the whole time" he was in police custody and that she therefore was "the person who could best address the issue of the arrest photo" (272-74).

Defendant contends that the arrest photograph "contradicts all eyewitness testimony" (Petition at i) and that it "irrefutably show[s] that [defendant] was not, on the day in question, the man wearing the bright yellow hoodie and blue vest" (id. at 5). Those contentions are patently meritless. There is no contradiction between, on the one hand, the testimony that showed that defendant was wearing a yellow hoodie and a blue vest at the time of the robbery and at the time of the arrest; and, on the other hand, the

arrest photograph, which showed that defendant was wearing different clothing at whatever later time that photograph was taken, by which time he could have changed his outerwear.

Similarly, defendant asserts that "the robber was never out of sight long enough to have performed a miraculous wardrobe change" (id. at 11). But, in the absence of any evidence regarding the time when the photograph was taken and the circumstances of defendant's custody until that time, that assertion is utterly unsupported by the record and rests on speculation.

Contrary to defendant's suggestion (see Petition at 7 n.3), it is irrelevant to the propriety of the evidentiary ruling at issue that Officer Jordan stated that she would have invoked her Fifth Amendment privilege if called to testify in this case. Officer Jordan made that statement, after the defense had rested, during an inquiry by the court to determine whether she had been available to testify and whether the defense request for a missing witness instruction therefore should be granted (241-42 [69a-70a]). The court ultimately granted the defense request and gave a missing witness instruction, and thus the court apparently found that Officer Jordan was available to testify and that she would have invoked the privilege only with respect to her own pending case. Moreover, before the defense case, when defense counsel stated that the defense would not call Officer Jordan as a witness

in an attempt to lay a foundation for introducing the arrest photograph, counsel never cited, as a reason for not calling the officer, that her anticipated invocation of the privilege would render her testimony unavailable (see 167-72 [57a-62a]); and, later, in support of the defense request for a missing witness instruction and on summation, counsel instead argued the opposite position -- namely, that the officer's testimony was available.

Consequently, it was entirely reasonable for the trial court to rule that, in order to introduce the photograph, the defense needed to lay a foundation by showing the time when the photograph was taken and the circumstances of defendant's custody until that time, so that the jury could intelligently weigh the plausibility of the proffered defense theory -- which was that the clothing that defendant was wearing in the photograph was the same clothing in which he had been arrested, and that the complainant, the eyewitness, and Officer Thomas were all "misremembering" what defendant was wearing at the time of his arrest (142-43 [46a-47a]) -- against the plausibility of the explanation that defendant had exchanged his outerwear with someone else at the precinct by the time the photograph was taken.

In any event, the trial court's evidentiary ruling did not violate defendant's constitutional right to present a defense. This Court has held that exclusions of evidence were unconstitutional

when they "significantly undermined fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315 (1998). In this case, the ruling at issue did not have that effect, because defense counsel elicited testimony that allowed counsel to make essentially the same argument to the jury that counsel could have made if the photograph itself had been admitted.

In the presence of the jury, two witnesses -- the eyewitness and Officer Thomas -- were shown the arrest photograph and testified unequivocally that the clothing that defendant was wearing in the photograph was different from the clothing that he had been wearing at the time of the crime and the arrest. Upon viewing the photograph, the eyewitness testified that the clothes that defendant was wearing in the photograph were "[a]bsolutely not" the clothes he had been wearing earlier, and that there was "a big difference" between the yellow clothing that he had been wearing earlier and the color of the clothes shown in the photograph (67). When defense counsel showed the photograph to Officer Thomas, he testified, three times, that defendant was wearing different clothes (105-06 [17a-18a]).

During her summation, defense counsel capitalized on this testimony. Defense counsel reminded the jury that Officer Thomas had been shown the photograph during cross-examination, and counsel noted that while the clothing worn by the robber "is

supposed to be a blue ski vest, a hoodie, yellow, bright yellow hoodie," "[w]e know that when Mr. Alexander [defendant] was photographed at the precinct shortly after his arrest, that was not the color of the clothing that he was wearing" (265). Defense counsel similarly mentioned that the eyewitness had also been shown the photograph during cross-examination. Counsel noted that the eyewitness stated in his 911 call that the man whom he was chasing wore a yellow hoodie, but counsel, quoting the eyewitness's testimony, emphasized, four times, that there was a "big difference" between the yellow hoodie that the eyewitness described in his 911 call and the color of the clothing that defendant was wearing in the photograph (270-72). Defense counsel maintained that the police had simply stopped the wrong man riding a bicycle in the vicinity of the crime -- defendant -- and that the complainant misidentified defendant as her assailant (271).

Thus, the argument that counsel sought to advance by introducing the arrest photograph -- namely, the argument that the difference between the description of the robber's clothing given by the witnesses and the clothing that defendant was wearing in his arrest photograph supported the theory that defendant had been misidentified as the robber -- was put before the jury. Therefore, the court's ruling excluding the photograph did not "significantly undermine[] fundamental elements of the defendant's defense" and

did not violate his constitutional right to present a defense. See Scheffer, 523 U.S. at 315.

Moreover, contrary to defendant's contention (Petition at 8, 10-12), there was no "disparate treatment" of the parties with respect to the introduction of photographs. The photograph of the bicycle was admitted into evidence because Officer Thomas testified that the photograph accurately depicted what defendant's bicycle looked like on the day of his arrest (76-78 [8a-10a]), and the photocopy of the currency was similarly admitted because Officer Thomas testified that the photocopy accurately depicted the money that he recovered from defendant (83-85 [11a-13a]). But, by contrast, Officer Thomas did not testify that he ever saw defendant in the clothes depicted in the arrest photograph, or that he knew at what time the photograph was taken, or that he knew what opportunities defendant might have had to exchange his clothes with someone else before the photograph was taken. Thus, the arrest photograph was excluded because the necessary foundation was lacking, not because of any alleged disparate treatment.

III. Any Constitutional Error in the Evidentiary Ruling Was Harmless.

The petition for certiorari should be denied for the additional reason that, even if the evidentiary ruling at issue

were held to be unconstitutional, any such constitutional error would be harmless, in light of the strength of the prosecution's case and the minimal impact of the ruling at issue on defendant's ability to present his defense.

The evidence of defendant's guilt was overwhelming. Defendant was apprehended and identified just eight minutes after the commission of the gunpoint robbery of the complainant during daylight hours. Both the complainant and an eyewitness promptly identified defendant, and both witnesses recognized the yellow hooded sweatshirt and the blue vest that the robber had been wearing. Defendant threw a gun to the ground when he was confronted by the police. In addition, the police recovered from defendant one $20 bill and two $10 bills, which matched the number of bills and the denominations of the bills taken from the complainant.

Furthermore, during the trial, defense counsel was able to show the arrest photograph to two witnesses -- the eyewitness and Officer Thomas -- and to elicit from both of those witnesses unequivocal testimony that the clothing that defendant was wearing in the photograph was different from the clothing that he had been wearing at the time of the arrest. Relying on that testimony, counsel argued at length on summation that the difference between the description of the robber's clothing given by the witnesses

and the clothing that defendant was wearing in his arrest photograph supported the theory that defendant had been misidentified as the robber. In light of that testimony regarding the clothing that defendant was wearing in his arrest photograph, and in light of defense counsel's reliance on that testimony in summation, the exclusion of the photograph itself had little or no effect on the argument that counsel was able to make to the jury, because the photograph would have been largely cumulative of the testimony that the clothing defendant was wearing in the photograph was different from the clothing he was wearing at the time of his arrest.

Under these circumstances, there is no reasonable possibility that the introduction of the arrest photograph would have changed the verdict. Consequently, any constitutional error in the exclusion of that photograph was harmless beyond a reasonable doubt. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (harmless-error analysis applies to exclusion of evidence in violation of Confrontation Clause); Chapman v. California, 386 U.S. 18, 24 (1967) (for federal constitutional error to be held harmless, it must be harmless beyond a reasonable doubt).

* * *

Accordingly, in the absence of any basis to conclude that the evidentiary ruling at issue violated the Constitution, let alone

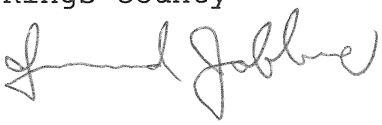
that it would require reversal of defendant's conviction, this case does not warrant review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

ERIC GONZALEZ
District Attorney
Kings County



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January 7, 2020

No. 19-6063

In the Supreme Court of the United States

WILLIAM ALEXANDER,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

REPLY TO STATE'S BRIEF IN OPPOSITION

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As respondent's opposition makes clear, the critical facts are not in dispute.[1] What is disturbing is how respondent addresses the fact that Mr. Alexander's clothes in his arrest photo (Pet. at 3; 72a), did not match those of the robbery suspect.

Rather than acknowledging that this major discrepancy was indeed relevant, probative, and highly exculpatory, respondent clings to the speculation used by the trial court as an excuse to deny the introduction of the photo in the first place. Respondent posits that the police-generated photograph could never be admitted because there is no sensible way to

[1] The robbery suspect wearing the bright yellow hoodie and blue vest was chased from the scene, (Opp. at 3-4); eventually spotted and pursued by NYPD Officer Thomas who "never los[t] sight of him," (*id.* at 5); until he was captured, arrested, and processed at the station, (*id.* at 5-6); and his photograph was taken "the same day," (*id.* at 6). Petitioner apologizes for transforming a "twenty-something" suspect into a teenager. (*See* Opp. at 4 n.2; *see also* Trial Tr. 65 ("Black man in his 20s").) The fact remains that Mr. Alexander's age was significantly higher—he was a 39-year-old man at the time of his arrest. (72a.)

prove or disprove whether Mr. Alexander changed his clothes in lock-up (Opp. at 16-17, 20), ignoring the other obvious exculpatory theory that Mr. Alexander, as so often occurs for black men, was misidentified.[2]

Indeed, the Appellate Division's decision, on review in this petition, found no analogue to support the proposition that mugshots become unreliable when they do not match the prosecution's theory of the case. (*See* 1a.) Instead, the decision cited *People v. Price*, 29 N.Y.3d 472 (2017), a case where the prosecution was not allowed to present a photo found on the internet as a photo of the accused, due to the lack of foundation connecting the individual depicted to the defendant. *Id.* at 478-49. It should be self-evident, however, that a police-generated mugshot, provided through discovery, is of a substantially higher quality and far more reliable than something downloaded off the internet. *Cf. id.* at 476 ("testimony establishing a chain of custody may suffice to demonstrate authenticity in other circumstances"); *People v. Slavin*, 1 N.Y.3d 392, 403

[2] Aside from common sense—which should tell us that lock-up is not a free-for-all where arrestees can exchange clothes with whomever they wish—there are a multitude of sources that explain the process by which arrestees are processed and photographed. *See, e.g.*, *Bell v. Poole*, No. 00 Civ. 5214 (ARR), n.1 (E.D.N.Y. Apr. 10, 2003) ("the mugshot pedigree form . . . contains color versions of both photographs taken at Central Booking"); *Dey v. Scully*, 952 F. Supp. 957, 965-66 (E.D.N.Y. 1997) ("arrestees [are] not allowed to receive visitors who might bring a change of clothing into the holding cells. . . . Moreover, throughout [] initial processing, [] arrestees [are] under constant observation by police officers[.]")

None of these sources suggest Mr. Alexander would have been free to don a new outfit while under constant surveillance.

(2004) ("arrest photographs" are "necessary for the administrative purpose of identifying those in the custody of the police."). This is particularly true, given that there was no disagreement that the arrest photo was of Mr. Alexander. (*See* Opp. at 6, 8.)

Thus, respondent hopes to obscure the absurdity of excluding the mugshot by justifying why the other police-generated photos *were* admissible. (Opp. at 23.) Yet, the trial court's handling of those photos only proves petitioner's point—that the photo was admissible, and any questions about it should have gone to its weight. Indeed, the only discernable reason for why the court denied the mugshot's admission was that the court had already credited the prosecution's theory of the case. (20a-21a.)

For starters, the court's treatment of the photograph of the money shows that foundation principles were understood and properly applied—when it came to evidence offered by the prosecution. Officer Thomas explained he had recovered the same amount of currency, as that pictured in the photo, from the individual arrested for the robbery. (11a, 13a.) But he did not know the specifics of the actual bills recovered, *i.e.*, their serial numbers, or what happened to them after he gave them to Officer Jordan. (12a.) Nevertheless, the court admitted the photo and said that his lack of knowledge went to the weight of the evidence rather than its admissibility. (13a.)

In contrast, the photo of the bicycle presents the more typical situation. Officer Thomas had seen the bike—and he agreed with how it was depicted in the photo. (9a-10a.) Therefore, even though the actual

photograph was taken by Officer Jordan, the photo was admitted. (*Id.*)

The only difference between the mugshot and the photo of the bicycle was Officer Thomas's statement that the clothing was different. (*See* 17a-20a; Opp. at 8.) Yet, that disagreement—particularly given Thomas's confirmation that the photo depicted Mr. Alexander (17a-18a)—should have gone to weight rather than admissibility, just like the photo of the money. But the trial court did not provide the defense with the same treatment that it provided the prosecution. When the court excluded the photo on Thomas's say-so alone, it improperly based its decision on "the strength of only one party's evidence[.]" *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

Given the dearth of credible reasons for excluding the mugshot, respondent also hopes to use defense counsel's argument on summation as a substitute for Mr. Alexander's right to present a defense through evidence. Respondent thus asserts that the jury understood the issues despite never seeing the photograph because defense counsel argued that when Mr. Alexander was "photographed at the precinct" the brightly colored outfit "was not the color of the clothing that he was wearing." (Opp. at 10.) But, as the jury was properly instructed, summations are not evidence. *See also Darden v. Wainwright*, 477 U.S. 168, 183 (1986) ("arguments [are] not evidence").

The jury needed to see that Mr. Alexander was wearing street clothes with a hood and a vest. And, they needed to see the stark difference in the colors,

to see and hear about the actual maroon and gray outfit that Mr. Alexander was wearing. Otherwise, the jury could never understand why this photo was critical to Mr. Alexander's defense when all the jury heard was that he was wearing "different clothes" in his arrest photo. (*See* Opp. at 7, 8.)[3]

For all they knew, he might have been wearing a jail jumpsuit in the photograph, since the defense could not show them the actual outfit and colors that were depicted. And, in response, the prosecution would have been able to offer evidence to explain the stark difference between his outfit and the outfit described by the witnesses.

That is why the prosecution fought so hard to exclude this evidence at trial. It was afraid of this powerful, exculpatory evidence and concerned that there was no credible way to prove the far-fetched theory that Mr. Alexander had somehow found extra clothes and changed into them while in lock-up. But that is exactly why *Chambers* and *Holmes* say this type of evidence should not be excluded on the basis of technical evidentiary rules. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Holmes*, 547 U.S. at 324-27.

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[3] Moreover, the defense would have been able to cross-examine each witness, and impeach their credibility, regarding the inexplicable difference between the outfits. Indeed, the defense might have been able to question the admissibility of the prior identifications, given that the eyewitness and the complainant both noted that they had recognized the man being arrested based on his clothing. (Trial Tr. 37 ("I recognize[d] him by . . . the yellow jacket"); 55 ("I recognized him, the same clothes").)

Since the defense's argument was that the wrong person was charged with these crimes—and that the unique clothing of the perpetrator did not match Mr. Alexander's—this compelling misidentification evidence should have been admitted and examined for the benefit of the jury, as constitutionally required. That remains true even if the arresting officer, who processed the paperwork, is not readily available either due to her "open criminal case," (Opp. at 6), or due to her credibility problems. (*See* Pet. at 4 (discussing Officer Jordan's failure to provide an exclusionary DNA sample), 5 n.2 (discussing Jordan's false grand jury testimony, left unaddressed by respondent's opposition).) Given the defendant's constitutional right to present a defense, any questions about what transpired between arrest and photographing were for the jury to explore through weighing the evidence, not speculation.

In sum, petitioner agrees with respondent on the standard for summary reversal: "situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). All three conditions are present. As demonstrated by the petition and this reply, any contention that there was no constitutional error in this case does not fit the uncontested facts.[4]

[4] To the extent there are any questions requiring full-briefing, plenary review remains an option. *See Schweiker*, 450 U.S. at 791. It remains petitioner's position, however, that the exclusion of this photograph in a misidentification case is beyond clear error—and the harm is palpable.

"[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" *Arizona v. Youngblood*, 488 U.S. 51, 72 (1988) (Blackmun, J., dissenting). Without the photograph, Mr. Alexander had little chance to counter that powerful, though demonstrably mistaken, evidence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 17, 2020

(ORDER LIST: 589 U.S.)

CERTIORARI -- SUMMARY DISPOSITIONS

19-568 AZANO MATSURA, JOSE S. V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Rehaif v. United States*, 588 U. S. ___ (2019).

19-6496 SMITH, DAVID E. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Rehaif v. United States*, 588 U. S. ___ (2019).

19-6871 VAZQUEZ, JUSTIN V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Rehaif v. United States*, 588 U. S. ___ (2019).

ORDERS IN PENDING CASES

19A721 (19-1024) POWE, WAYNE, ET UX. V. DEUTSCHE BANK NATIONAL TRUST CO.

The application for stay addressed to Justice Sotomayor and

referred to the Court is denied.

19A728 PRATT, HENRY V. BARR, ATT'Y GEN.

The application for stay of removal addressed to Justice Ginsburg and referred to the Court is denied.

19M95 HOLLAND, TYRONE W. V. KEMP, GOV. OF GA

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

19M96 KANEKA CORP. V. XIAMEN KINGDOMWAY GROUP, ET AL.

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is denied.

19M97 ADAMS, BARTON J. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is denied.

19M98 IN RE TCT MOBILE INTERNATIONAL LIMITED

The motion for leave to file a petition for a writ of mandamus with the supplemental appendix under seal is denied.

19M99 KAUR, RAMINDER V. MARYLAND

19M100 H. K. V. V. FL DEPT. OF CHILDREN, ET AL.

19M101 H. K. V. V. FL DEPT. OF CHILDREN, ET AL.

The motions for leave to file petitions for writs of certiorari with the supplemental appendices under seal are granted.

19M102 KNOCHEL, JAMES J. V. MIHAYLO, EMILY N.

The motion for leave to file a petition for a writ of certiorari under seal is denied.

18-1323) JUNE MEDICAL SERV., ET AL. V. RUSSO, SEC., LA DEPT. OF HEALTH
)
18-1460) RUSSO, SEC., LA DEPT. OF HEALTH V. JUNE MEDICAL SERV., ET AL.

The motion of Foundation for Life for leave to file a brief as *amicus curiae* out of time is denied.

18-9526 McGIRT, JIMCY V. OKLAHOMA

19-199 SALINAS, MANFREDO M. V. RAILROAD RETIREMENT BOARD

The motions of petitioners to dispense with printing the joint appendices are granted.

19-251) AMERICANS FOR PROSPERITY V. BECERRA, ATT'Y GEN. OF CA
)
19-255) THOMAS MORE LAW CENTER V. BECERRA, ATT'Y GEN. OF CA

The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

19-438 PEREIDA, CLEMENTE A. V. BARR, ATT'Y GEN.

19-635 TRUMP, DONALD J. V. VANCE, CYRUS R., ET AL.

The motions of petitioners to dispense with printing the joint appendices are granted.

19-5299 ROSADO, SAMUEL R, V. LUCID ENERGY, INC.

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

19-6804 HELMS, MICHAEL V. WELLS FARGO BANK, ET AL.

19-6967 BOYD, MICHAEL E., ET AL. V. CA PUB. UTIL. COMM'N, ET AL.

19-7081 ADEBOWALE, ADEOYE O. V. WOLF, SEC. OF HOMELAND, ET AL.

19-7268 RUPAK, ACHARAYYA V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until March 16, 2020, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

19-123 FULTON, SHARONELL, ET AL. V. PHILADELPHIA, PA, ET AL.

The petition for a writ of certiorari is granted.

18-9699 GARCIA, JOSE V. UNITED STATES

19-107 ASARO, VINCENT V. UNITED STATES

19-273 BINDAY, MICHAEL V. UNITED STATES

19-282 OLIVAS-MOTTA, MANUEL V. BARR, ATT'Y GEN.

19-284 MERCADO RAMIREZ, JOSE J. V. BARR, ATT'Y GEN.

19-347 AER ADVISORS, INC., ET AL. V. FIDELITY BROKERAGE SERVICES, LLC

19-389 DOBYNS, JAY A. V. UNITED STATES

19-433 SUTHERLAND, PATRICK E. V. UNITED STATES

19-475 KARINGITHI, SERAH N. V. BARR, ATT'Y GEN.

19-486 TAFFE, DONNETT M. V. WENGERT, GERALD E., ET AL.

19-488 WALTNER, STEVEN T., ET UX. V. CIR

19-527 HUSKISSON, PAUL V. UNITED STATES

19-541 LAMBERT, MICHAEL V. ESTATE OF KEVIN BROWN, ET AL.

19-569 AYESTAS, CARLOS M. V. DAVIS, DIR., TX DCJ

19-600 KRAKAUER, JON V. CHRISTIAN, CLAYTON T.

19-603 SILGUERO, MARK, ET AL. V. CSL PLASMA, INC.

19-609 SHEPHERD, ERIN J., ET AL. V. STUDDARD, ANGELA

19-619 CISCO SYSTEMS, INC. V. SRI INTERNATIONAL, INC.

19-669 WATKINS, MATTHEW T. V. SAUL, ANDREW M.

19-691 CLARK, ARTHUR L. V. GEORGIA

19-693 BALOV, PETER V. CALIFORNIA

19-694 BAKER, HEATHER V. TRENTON, MI, ET AL.

19-695 WEBB, DEAN B., ET AL. V. DEERE CREDIT, INC., ET AL.

19-698 NORA, WENDY A. V. MN OFFICE OF LAWYERS PROF'L

19-5568 NELSON, KEITH D. V. UNITED STATES

19-5784 VILLECCO, MICHAEL V. STARK, DANIEL W., ET AL.

19-5805 ALDISSI, MAHMOUD, ET UX. V. UNITED STATES

19-5829 CASTRO-LOPEZ, YONI V. UNITED STATES

19-5865 BALDERAS, PABLO S. V. UNITED STATES

19-5869 ENRIQUEZ-HERNANDEZ, JAIME V. UNITED STATES

19-5875 GONZALEZ-TERRAZAS, ALFREDO V. UNITED STATES

19-5905 DAVIS, RICKY V. UNITED STATES

19-5907 CASTANEDA-TORRES, LUIS V. UNITED STATES

19-5946 SPENCE, ANTHONY C. V. UNITED STATES

19-5979 LOZANO, RODRIGO P. V. UNITED STATES

19-6015 ARIAS-DE JESUS, ROQUE V. UNITED STATES

19-6037 ANZURES, JOHN V. UNITED STATES

19-6042 CORTES, GERARDO T. V. UNITED STATES

19-6086 TORRES, LUIS A. V. UNITED STATES

19-6087 MALIK, ATIF B. V. UNITED STATES

19-6095 FULTON, CHARLES D. V. UNITED STATES

19-6110 AYALA-GONZALEZ, ABIMAEL V. NEW YORK

19-6199 RAMIREZ, EMETERIO E. V. UNITED STATES

19-6200 SMITH, MICHAEL S. V. FLORIDA

19-6229 DOUGLAS, JOHN J. V. UNITED STATES

19-6252 RAMIREZ, EDINSON H. V. MARYLAND

19-6264 NELSON, ORANE V. UNITED STATES

19-6265 KNIGHT, ALEX V. UNITED STATES

19-6277 RUVALCABA-GARCIA, MARIO V. UNITED STATES

19-6290 PINEDA-CASTELLANOS, SERVANDO V. UNITED STATES

19-6343 RICHMOND, ANTOINE V. UNITED STATES